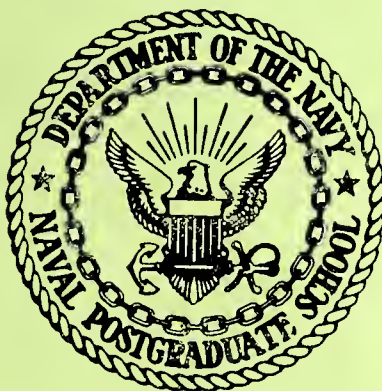


NAVAL POSTGRADUATE SCHOOL

Monterey, California



THESIS

ARMED SERVICES BOARD OF CONTRACT APPEALS:
ANALYSIS OF SUSTAINED DECISIONS
ON DOD SUPPLY CONTRACT DISPUTES

by

Robert Douglas Parsons

December 1986

Thesis Advisor:

Raymond W. Smith

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Armed Services Board of Contract Appeals:
Analysis of Sustained Decisions
on DOD Supply Contract Disputes

by

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Lieutenant Commander, Supply Corps, United States Navy
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Submitted in partial fulfillment of the
requirements for the degree of

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The purpose of this thesis is to identify deficiencies in the Federal Government's acquisition process through an analysis of ASBCA decisions for the period 1981 through 1985. The study focused upon Department of Defense contract default terminations whose conversion to terminations for the convenience of the Government resulted from Board decisions. The essence of the study was to determine if meaningful conclusions could be drawn from the analysis that could be used to improve the acquisition process. Using this research methodology several deficiencies were found such as, actions and inactions by the acquisition team that waived the Government's right to subsequently pursue a default termination, lack of communications and basic contract knowledge, inadequate training, and a general misunderstanding of the substantial compliance aspects in contracts requiring first article units. Additional research is required, however this study concluded that analysis of sustained ASBCA appeals could be a useful technique for making improvements to the acquisition process.

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I. INTRODUCTION

A. BACKGROUND

Procurement authority for the Federal Government is derived from the Constitution as a power exercised under the general powers of the Sovereign. The secretary or administrator of most federal departments and agencies is authorized to make purchases and contract for goods and services. Contracting authority is delegated to the directors of the offices that carry out the contracting activities [Ref. 1:pp. 34-35] who, in turn, usually further grant to contracting officers [Ref. 2:p. 24]. Congress directs, through its legislative process, the laws from which the Executive branch will formulate acquisition policy and implementing procedures.

The Federal Acquisition Regulation (FAR) provides the following definition:

"Contracting officer" means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.
[Ref. 3:p. 2-1]

Since April 1, 1984, the principal regulation providing guidance to the contracting agencies is the Federal Acquisition Regulation (FAR). The FAR is further modified by FAR

supplements issued by the Department of Defense (DOD), National Aeronautics and Space Administration (NASA), and others. Additional rules affecting the acquisition process originate from a number of different sources, for example, Executive Orders of the President, the Office of Federal Procurement Policy (OFPP), and service secretaries. [Ref. 2:pp. 10-15]

To satisfy Government's material and service requirements, contracting officers award contracts, defined as "a mutually binding legal relationship obligating the seller to furnish supplies or services (including construction) and the buyer to pay for them." [Ref. 3:p. 2-1] The majority of contracting actions run quite efficiently and flow from the initial requirements determination to completion with no difficulties. On other occasions the contract could result in a termination with no cost to the Government or the contractor (a no cost settlement), a termination for the convenience (T for C) of the Government, or a termination for contractor default (T for D).

From the Government's standpoint, T for C is an expensive method of discontinuing a contractual relationship with a supplier. Nonetheless, there are occasions when it is in the best interests of the Government to execute a T for C. "If the contracting officer decides to terminate for convenience, the Government's liability will be admitted and the contractor will recover his incurred cost and profit on

work done." [Ref. 2:p. 776] T for C's are used most often when the Government no longer requires the contracted goods or services.

1. Termination for Default

A T for D is the Government's ultimate method of dealing with a contractor's failure to comply with the terms of the contract. When the Government exercises its right to terminate for default, the contractor becomes liable for the consequences of the contract breach. The FAR specifies the justifications for terminating the contractor by use of the default clause. For example, the default clause for "fixed price supply and services" contracts provides for termination, completely or partially, if the contractor fails to:

- (a) make delivery of the supplies or to perform the services within the time specified in this contract,
- (b) perform any other provision of this contract, or
- (c) make progress and that failure endangers performance of the contract. [Ref. 3:p. 49-15]

Additionally, the contractor could be terminated for default in two other situations:

The first--failure to proceed--arises where the contractor fails or refuses to go forward with the work according to directions of the contracting officer. The second--anticipatory repudiation--occurs when the contractor clearly expressed through words or conduct an intention not to complete the contract work on time. [Ref. B:p. 640]

However, the contracting officer's termination decision is not the final word. The terminated contractor is not without recourse. Appendix B graphically portrays the routes of contractor relief. The Armed Services Board

of Appeals (ASBCA) is the administrative avenue while the U.S. Claims Court is the judicial course of appeal. The ASBCA is the DOD and service secretaries' authorized administrative representative in resolving contract disputes. The ASBCA renders decisions concerning questions of fact through the administrative procedure specified in the Disputes clause of the contract. A standard contract Disputes clause is provided as Appendix C.

B. PROBLEM STATEMENT

There is no on-going systematic effort to incorporate the new precedents established by the ASBCA decisions and the implementation of new legislation into a usable form that contracting officers can use on a daily basis. This knowledge is vital if the contracting officer is to execute his/her duties "in the best interests of the Government." The most complete information concerning ASBCA decisions can be obtained from Board of Contract Appeals Decisions. The Federal Contract Report and other publications periodically highlight specific decisions, but the completeness of the analysis, in the total scheme of things, is usually inadequate to be of much use at the working level of the contracting process.

The Board of Contract Appeals Decisions published by the Commerce Clearing House Inc., is presented in a case-mix format and consists of thousands of pages per year. The tailored extracts available from Federal Legal Information

through Electronics (FLITE), while being less cumbersome, are not readily available nor in a usable form to substantially benefit contracting officers in their day-to-day operations. This research will address this information gap.

DOD contractor disputes decisions are rendered by the ASBCA or the U.S. Claims Court. Exceptions to this procedure include bid protests which are decided by the Comptroller General of the General Accounting Office. The General Services Board of Contract Appeals (GSBCA) exercises jurisdiction in bid protests related to computer and computer-related equipment and support materials. [Ref. 8:p. 148]

An analysis of the sustained ASBCA and U.S. Claims Court decisions with the intent of identifying recurring problems and/or errors by contracting officers is needed to improve the acquisition process.

The ASBCA publishes an annual report, addressed to the Secretary of Defense and Service secretaries, that reports Board decisions by Service branch, but additional case load divisions are not segregated by Service [Ref. G]. The FY-85 report is provided as Appendix A. An analysis of the report will reveal that appeals of default terminations comprise 20% of the court's caseload.

Contractors rely very heavily upon ASBCA decisions in the performance of contract work [Ref. 9:p. 14]. Therefore, it would behoove the Services to do the same.

C. OBJECTIVES AND RESEARCH QUESTIONS

The overall objective of this study is to improve the Department of Defense (DOD) acquisition process as it relates to areas in which protests occur most frequently. To accomplish this objective, an analysis of ASBCA and U.S. Claims Court decisions will be undertaken to determine if meaningful conclusions to benefit the contracting process can be identified. This study will concentrate upon the following questions.

Primary Question:

Can meaningful conclusions be drawn from an analysis of sustained ASBCA and U.S. Claims Court appeals concerning Department of Defense contracts which were originally terminated for default (T for D), but subsequently settled as terminations for convenience (T for C) as a result of an agency board or judicial decision?

Subsidiary Questions:

1. What are the principles generally cited for sustaining a contractor's appeal of a default termination?
2. Once a contract termination is successfully appealed, what are the contracting officer's options and associated considerations?
3. How might the T for D decision process be improved to reduce the number of successful contractor appeals?

D. STUDY LIMITATIONS AND ASSUMPTIONS

This research effort is limited to an analysis of sustained contractor appeals rendered by the Armed Services Board of Contract Appeals and the U.S. Claims Court.

Decisions which were dismissed, denied, or settled cases were not within the scope of this research, nor were contracting officer/contractor settlements that were reached prior to a decision by the Board or court examined. The research was limited to decisions rendered against the U.S. Navy/Marine Corps, Army, Air Force, and Defense Logistics Agency. These four categories represent the vast majority of the DOD contracts. Omission of the small amount of contracting done by the Office of the Secretary of Defense will not impact the analysis or conclusions. Since the study concentrated on default terminations, bid protests were not surveyed.

The ASBCA and the U.S. Claims Court consist of qualified attorneys, while the research has a limited legal background. Any possible biases of the research should not surface since the in-depth analysis will be based upon the cases' full text as published in the Commerce Clearing House publication.

The study will be limited to supply contracts and will exclude research and development (R&D), construction, services, and others. To obtain a broad perspective and enhance the identification of trends or persistence problem areas, the data will include the four most recent and complete fiscal years readily available to the researcher: Fiscal years 1982 through 1985.

FLITE was utilized to reduce the research data to a manageable level, therefore it is assumed that FLITE will identify all, or at least a representative sample, relevant cases for this analysis. It was assumed that the cases studied contain the necessary material from which meaningful recommendations can be derived.

The Defense Federal Acquisition Regulation Supplement (DFARS) and Government Contract Law are the primary sources of policy and interpretation, since these are the information sources relied upon by field contracting officers, in addition to his lawyer.

Further, it is assumed that all readers will have a basic understanding of the Government acquisition process and contract law.

E. LITERATURE REVIEW

The literature review encompassed the Naval Postgraduate School's (NPS) main, thesis, and acquisition libraries. The computerized data base of FLITE and the Defense Logistics Studies Information Exchange (DLSIE) were utilized.

The most successful inquiries proved to be FLITE and DLSIE. Other than two NPS master's theses completed in 1979, significant, recent research in the area of appealed disputes is limited. The NPS thesis, Armed Services Board of Contract Appeals: Analysis of Sustained Decisions on Navy Supply Contract Disputes by Robert Howdyshell [Ref. 9] researched fiscal year 1978 and proved useful in structuring

this research effort. The other NPS thesis was the U.S. General Accounting Office: Analysis of Sustained Decisions on Department of Defense Contract Related Protests (1975-1978) by Michael Younker [Ref. 10].

The source data for analysis provided by FLITE, located at Lowery AFB Denver, Colorado, was outstanding. Without the superior service attitude, legal knowledge, and data base expertise of FLITE lawyer Mr. Robert Lundwall, the amount of data analyzed in this research would have been extremely limited.

The NPS acquisition library was most useful in providing ready copies of DLSIE-generated research microfiche while the NPS main library was most valuable for its current and back copies of the ASBCA decisions published by Commerce Clearing House, Inc., which were utilized for the in-depth analysis of FLITE-identified cases and for its Government procurement publications.

F. ORGANIZATION

The general area of study is presented in the Background section of Chapter I. The Problem Statement justifies the need for this in-depth research effort. The Objectives were derived from the problem statement. The primary question and the three subsidiary questions provide the overall focus for the analysis and establish the benefit to be obtained from a solution. The scope of the research is refined in the Study Limitations and Assumptions. The Literature

Review explains the procedures followed in the analysis and research effort. The Organization section outlines the presentation of the study.

Chapter II, Framework, delves more deeply into the financial implications, termination criteria, and the necessary factors involved in a contract termination. Chapter III identifies the population and techniques used to gather the research data, while Chapter IV presents case-by-case synopses and the key principles of law concerning the 15 sustained contract appeals of DOD contractors.

The research analysis is presented in Chapter V. In Chapter VI, the conclusions of the research and recommendations for improving the acquisition process are presented, as well as recommendations for further research.

II. FRAMEWORK

A. GENERAL INFORMATION

The acquisition process is the means by which the Government obtains its needed materials, equipment, facilities, and services necessary to the performance of organizational missions. The contract is the tool used to reach these ends.

Contract language is developed by the Government, reviewed and/or modified with the contractor, and ultimately an agreement (binding contract) is reached as to the performance requirements of each party. Subsequently, differences in opinions concerning contract interpretation or changed conditions give rise to a dispute. A dispute is defined legally as:

A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. The subject of a litigation; the matter for which a suit is brought and upon which issue is joined, and in relation to jurors are called and witnesses examined. [Ref. 6]

B. DEFAULT TERMINATION

When one party to a contract fails to perform, the other party has the right of recovering monetary damages for the breach. A common definition of breach is "a nonperformance of any contractual duty of immediate importance." [Ref. 8:p. 155]

The FAR provides the contracting officer with specific instructions as to the factors to be evaluated when considering a termination for default. He must review the situation with acquisition, technical, and legal personnel prior to deciding upon a no-cost settlement, a termination for convenience, or one of default [Ref. 3:p. 49-16]. If the contractor's failure is one of non-delivery by the contract delivery date or a situation of anticipatory repudiation is determined, the contracting officer may terminate immediately. Although it is not required in the before-mentioned circumstances, issuance of a show cause letter is encouraged. For other failures, the "cure notice" must be sent to the contractor, thus allowing a reasonable amount of time (normally ten days) to respond as to the remedy for the deficiency. The one exception would be a situation in which the cure period extended beyond the delivery date. A knowledgeable contracting officer would wait for the delivery date to lapse and exercise a default termination action. If the contracting officer receives no response within the cure period or decides that the response is inadequate/inexcusable, the contracting officer has the right to immediately exercise a termination for default. [Ref. 2:pp. 710-713] Prior to termination action, it is recommended that the contracting officer issue a "show cause" letter to permit a mutually beneficial resolution.

Terminations for default are treated very differently depending upon the contract type, i.e., fixed-price or cost type. Under a fixed-price contract the impact upon the contractor can be quite severe:

- (i) the Government is not liable for the costs of unaccepted work--the contractor is entitled to receive payment only for work accepted by the Government;
- (ii) the Government is entitled to the return of progress, partial or advance payments;
- (iii) the Government has the right but not the duty to appropriate the contractor's material, inventory, construction plant and equipment at the site, and, under supply contracts, his drawings and plans--the price for the appropriated items to be negotiated;
- (iv) the contractor is liable for excess costs of reprocurement or completion; and
- (v) the contractor is liable for actual or liquidated damages. [Ref. 2:p. 635]

As noted above, one of the principal rights of the Government is that of charging the defaulting contractor for the Government's excess costs in reprocurring the contracted items or services. Other costs borne by the contract include the cost of moving Government-furnished property to the reprocurement contractor's plant, the expense of added inspections, and the administrative costs of readvertising (resolicitation) [Ref. 4:p. 157]. Also, a default termination may adversely impact the contractor's eligibility for future Government contracts where past performance is a consideration in the determination of contractor responsibility [Ref. 2:p. 635].

Under a cost reimbursement contract, the financial impact upon the contractor is much less severe than that realized under a fixed price contract. The contractor is reimbursed for all allowable costs, regardless of whether the work has been accepted by the Government and the contractor is entitled to a profit on work accepted by the Government [Ref. 4:p. 637].

The overriding concern of the contracting officer, when considering a termination action, is what will be "in the best interests of the Government." Even if the Government has the right to terminate a contract, it may not be to its benefit to do so. The FAR provides the following guidance:

- (f) the contracting officer shall consider the following factors in determining whether to terminate for default:
 - (1) the terms of the contract and applicable laws and regulations.
 - (2) the specific failure of the contractor and the excuse for the failure.
 - (3) the availability of the supplies or services from other sources.
 - (4) the urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.
 - (5) the degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's ability as a supplier under other contracts.
 - (6) the effect of the termination for default on the stability of the contractor to liquidate

guaranteed loans, progress payments, or advance payments.

- (7) any other pertinent facts and circumstances.
[Ref. 3:p. 49-16]

C. TERMINATION FOR CONVENIENCE

The Termination for Convenience clause is a very unique power the Government has granted itself. It was developed primarily as a means to terminate war material contracts when winding down from a major conflict. While the T for C clause has been used as early as 1863, it came into widespread Government use as a result of The Urgent Deficiency Appropriation Act of 1917. The Act empowered the President "to modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or related materials" [Ref. 13:pp. 1104-5]. The use of convenience terminations was further established by The Contract Settlement Act of 1944, the Armed Services Procurement Act of 1947, and others. Currently, the FAR is the governing regulation of the Government [Ref. 13:pp. 1106-7].

In no other area of contract law has one party been given such complete authority to escape from contractual obligations. The clause gives the Government the broad right to terminate without cause and limits the contractor's recovery to costs incurred, profit on work done and costs of preparing the termination settlement proposal. Recovery of anticipated profit is precluded. [Ref. 2:p. 773]

Termination for convenience is a Government right that may be exercised by the contracting officer when it is in the best interests of the Government. It may not be used to

benefit, nor penalize, a contractor, i.e., if a contractor is performing at a loss or above profit expectations, a T for C action will not be used to change the contractor's relative financial position in contract performance.

The contractor is to be "made whole," that is, to place the contractor in the position he would have been in, at this time, had the contract not been terminated. The contractor is entitled to all allowable costs incurred in performing work authorized by the contract; a profit on work performed, to include work-in-process and finished goods; and the costs of preparing the termination settlement. In some instances, the contractor may be reimbursed for continuing costs after settlement that cannot be applied to the contractor's other business, e.g., specialized equipment or buildings purchased or leased specifically for performance of the terminated contract. Initial costs, such as production line set-up costs, costs in terminating subcontractors and overhead costs are also examples of allowable costs.

D. TERMINATION FOR DEFAULT CONVERSION

The FAR, para. 49.401(b) provides the following remedy for a T for D that was subsequently determined to be excusable:

If the contractor can establish, or it is otherwise determined that the contractor was not in default or that the failure to perform is excusable; i.e., arose out of causes beyond the control and without the fault or negligence of the contractor, the default clauses prescribed in 49.503 and located at 52.249 provide that a termination for default will be considered to have been a termination

for the convenience of the Government, and the rights and obligations of the parties governed accordingly. [Ref. 3:p. 49-15].

E. THE APPEALS PROCESS

Once the contracting officer has terminated the contract for default, under the Default clause, the contractor may appeal the decision under the Disputes clause. Generally, disputes arise when the contractor feels that his claim has not been dealt with equitably.

The Contracts Disputes Act of 1978 requires all DOD contract-related claims by the contractor against the Government, to be submitted to the contracting officer for a decision [Ref. 12:pp. 6-17]. A claim is defined as follows:

Claim: Right to payment whether or not such right is reduced to judgement, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgement, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured. [Ref. 6]

If a resolution of mutual agreement is not reached with the contracting officer the contractor can pursue an administrative resolution by appealing to the Armed Services Board of Contract Appeals (ASBCA) or the contractor can pursue a judicial decision by appealing to the U.S. Claims Court. Once the contractor has chosen the forum for his appeal (ASBCA or U.S. Claims Court), he is precluded from changing forums [Ref. 2:p. 947]. The ASBCA decisions are final, except:

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to Section 9 [41 USCA S. 607], notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence. [Ref. 2:p. 956]

The Federal Courts Improvement Act of 1982, as amended, gave the Court of Appeals for the Federal Circuit exclusive jurisdiction to hear Government or contractor appeals of ASBCA and U.S. Claims Court decisions. The U.S. Claims Court rulings will be overturned only if the findings of fact are clearly erroneous. [Ref. 2:pp. 956-7]

The appeals process is an expensive procedure for both parties, thus an appeal of a contracting officer's final decision is not undertaken lightly or arbitrarily. "There is also evidence that contract type, complexity of the contract, the contractor size and location are indicators of contracts which have a higher potential for a dispute." [Ref. 11:p. 74]

III. METHODOLOGY

A. POPULATION AND SAMPLE DESCRIPTION

The population under consideration in this study included 15 disputes of DOD supply contracts where the ASBCA rendered sustained decisions during fiscal years 1982, 1983, 1984, and 1985. The annual fiscal year Reports of Transactions and Proceedings of the ASBCA were obtained by the researcher from the ASBCA for the applicable fiscal years. Fiscal year 1985 is provided as Appendix A.

The researcher felt that four years would provide a population from which a representative number of T for D's could be extracted. Fiscal years 1982 through 1985 were chosen to reflect recent data and for the ease of access to the complete text in the Commerce Clearing House publication of ASBCA decisions.

Due to the small magnitude, less than three percent of the other agencies for whom the ASBCA rendered decisions, the inclusion of these agencies' cases in the total caseload totals will not distort the illustrative significance of data when total caseload is used as a base.

As stated earlier, the courts can render one of the following decisions: sustained, denied, settled, or dismissed. Denied and dismissed decisions represent cases in which the Government actions were valid. Although subjected

TABLE 1
TOTAL ASBCA APPEALS BY KIND OF PROCUREMENT

<u>Type</u>	<u>FY82</u>	<u>%</u>	<u>FY83</u>	<u>%</u>	<u>FY84</u>	<u>%</u>	<u>FY85</u>	<u>%</u>
Supply	299	32	401	35	437	34	427	34
Construction	358	38	427	38	515	39	504	40
R & D	34	3	13	1	18	1	16	1
Service	212	23	236	21	246	19	247	20
Surplus Sale	20	2	24	2	16	1	5	-
Other	15	2	30	3	74	6	66	5
*Total	938	100%	1131	100%	1306	100%	1265	100%

Source: Researcher's summarization of annual ASBCA
Report of Transactions and Proceedings

*Represent totals from the three Services, Defense Logistics Agency, and other. The other cases decided by the ASBCA, representing less than three percent of total appeals, include such agencies as Office of Personnel Management, Defense Mapping Agency, Health and Human Services, and Defense Nuclear Agency.

to substantial proceedings, the settled decision is the compromise of both parties' positions. Therefore, an analysis of the sustained contractor appeals was identified as fruitful ground for uncovering Government errors during contract performance.

The cases that were terminated by the Government for reasons of contractor default were chosen for analysis because these cases represent a disproportionately large segment of the ASBCA annual caseload. Of the 55 principal contract clauses or issues involved in disputes cited by the ASBCA, T for D appeals consistently average over 15%. The Changes clause was cited nearly as often, while all other

clauses/issues were cited much less frequently. Appendix A provides detailed data summaries.

B. DATA COLLECTION PLAN

To reduce the thousands of annual cases to a manageable level, the services of FLITE were utilized to provide listings of the ASBCA and U.S. Claims Court decisions in which the words "supplies" or "supply contract" and "termination for default" appeared in the FLITE synopsis. Fiscal years 1982 through 1985 were analyzed. FLITE is a computerized research service operated by the Judge Advocate General's Department, U.S. Air Force in Denver Colorado.

The search of U.S. Claims Court produced no pertinent cases, while the ASBCA search produced 132 default termination cases. Through individual case analysis, the researcher reduced the number of cases by identifying those with sustained decisions of contractor appeals for the three services and the Defense Logistics Agency (DLA). Decisions involving other DOD agencies, non-supply contracts, Government and contractor appeals of previous decisions, contractor appeals of excess procurement costs, and dismissed, denied, and settled cases were eliminated. The 132 cases were reduced to a population of 15 cases, in which a contractor terminated for default in a supply contract was converted to a termination for convenience by the Board.

During the literature search, it was discovered that one researcher questioned the completeness of the FLITE listings

[Ref. 9:p. 29]. Therefore, to validate the research technique, the researcher chose to compare the FLITE data to the Board Of Contract Appeals Decisions for one sample fiscal year. The indices in the three FY-85 volumes cited 105 cases involving default, of which only four cases (BCA No. 18498, 18043, 18059, and 17878) fit the research parameters. These four cases correlated with the four cases identified through analysis of data provided by FLITE. Thus, the researcher is confident of the completeness of the population selected.

IV. SYNOPSIS OF SUSTAINED APPEALS

A. GENERAL

An in-depth analysis was completed on the fifteen cases cited in Chapter III. The cases are arranged into the three categories, cited by the contracting officer as the primary reason for terminating the contract. On each sequentially numbered case, the ASBCA's principal justification for converting the default termination into one of the convenience for the Government is provided.

The presentation on each of the fifteen cases is formulated around a three step approach. It commences with a summation of the Findings of Fact and follows with an explanation of the Board's Decision. The third step further amplifies the Principle of Law cited by the Board for sustaining the contractor's appeal. Any divergence between the ruling and the current policies, regulations, or previous interpretations of law is presented. An analysis, based upon the cases and additional information provided in this chapter, is presented in Chapter V.

B. CASE ANALYSIS

1. Category One: Failure to Make Delivery

a. Case 1¹ Government Encouraged Continued Performance

(1) Findings of Fact. The contract required an October 1974 delivery of 57 rebuilt aircraft engines to the U.S. Air Force. No deliveries were made in October. By a 9 October agreement, amended 20 November 1974, 25 engines were scheduled for delivery in November. An agreement for December deliveries was made on 07 November and twice amended. While the contractor made partial deliveries, the deliveries were becoming increasingly delinquent. Due to the contractor's failure to meet required schedules, the Government issued "show cause" letter on 20 December 1974. On 07 January 1975, the Government agreed to a February delivery schedule of 56 engines. On 29 January, another "show cause" notice was issued, prompted by non-delivery of 41 of the 55 engines scheduled for December.

On 29 January, the Government withdrew its procurement quality assurance (PQAP) activities from the contractor's plant, due to six of seven engines failing critical inspections. On 07 February, the contract was modified with new delivery dates of March through August 1975 for the October and November delinquent deliveries. The Government completed a quality audit on 20 February in

¹85-3 BCA: 18,498. Gary Aircraft Corp. ASBCA No. 20,534. October 17, 1975 Contract No. F41608-74-D-1645.

which it disassembled a rebuilt engine in the contractor's plant. Forty-seven defects were discovered. The next day, 21 February 1975, the contractor corresponded corrective actions it had taken to eliminate the quality problems.

The Government's quality assurance (QA) representative responded, on 25 February, that the corrective actions were unsatisfactory and advised the administrative contracting officer (ACO) that the contractor's QA system was "out of control."

On 28 February, the ACO recommended immediate termination under the Default clause of the contract. However, on the same day, the procuring contracting officer (PCO) approved a contract modification that increased the number of engines to be rebuilt under this contract. Notice of termination for default was forwarded by the ACO on 05 March 1975. The basis of the termination was the failure to make the December, January, and February deliveries.

(2) Decision. During the course of the contract, the Government's conduct toward the contractor was clearly inconsistent with an intention to terminate the contract for default. No deliveries were made in October 1974, but partial deliveries were received in November and December. The contractor was advised of QA problems and took measures to correct the deficiencies. On 28 February, the Government increased the quantity of engines on the contract and, thus, further encouraged contractor

performance and implied that the deliveries were not "of the essence." Appeal sustained.

(3) Point of Law. No new policy or interpretation of law was presented in the case. It clearly reaffirms that the Government cannot encourage performance of a contractor who is repeatedly late with deliveries and/or takes corrective actions to problems noted by the Government, and then terminate for default.

a. Case 2² Government Encouraged Continued Performance

(1) Findings of Fact. In November 1983, the contractor was awarded a contract to supply 244 airport light hoods on or before 29 June 1984. Two months after award, the item manager urged termination of the contract because the current supply would last at least ten years considering the declining demand rate. This action was infeasible due to the high termination costs to the Government it would entail.

On 23 July 1984, past the required delivery date, the Government QA representative inspected and rejected a lot consisting of 83 hoods, for excessive burrs. On 26 July, the contractor responded by correcting the problems through disassembly, removal of the burrs, and reassembly of the hoods. The QA representative reinspected and approved the hoods.

²85-2 BCA 17,878. Multi-Electric Mfg., Inc. ASBCA No. 30,055. January 29, 1985. Contract No. DLA4000-84-C-0248.

reassembly of the hoods. The QA representative reinspected and approved the hoods.

At the close of business, on 27 July, the company closed for a two week vacation. A "show cause" letter was issued 30 July for failure to deliver by the 29 June delivery date. Two days later a response from the contractor acknowledged receipt of the notice; advised that the plant was on a two week vacation; and relayed the fact that the entire shipment was ready for inspection. After several unsuccessful attempts, the Government's QA representative did contact the plant on 13 August, but was told the material was not ready for his inspection. The contract was terminated for default the following day.

(2) Decision. It was clear that the contractor failed to comply with the 29 June 1984 contract delivery date. The Government's inspection on 23 July and its statements as to the corrective actions required were relied upon by the contractor as evidence to continue its performance and effectively waived the 29 June delivery date. No new delivery was established, thus the contract could not be terminated for a nonexistent due date.

(3) Point of Law. When the Government acts in a manner as to encourage performance past the contract delivery date, it has waived its right to terminate for non-delivery [Ref. 2:p. 689]. A key ingredient to this determination is the "contractor's reliance" upon the Government

actions of inactions to continue performance. To satisfy this requirement, the contractor needs to continue the performance necessary to contract compliance, that is to say, the contractor continues to act in a manner conducive to satisfactory delivery of the items [Ref. 2:p. 689].

c. Case 3³ Government Encouraged Continued Performance

(1) Findings of Fact. On 22 August 1978, the contractor was awarded a supply contract for incremental deliveries of wet weather ponchos. The Government was late in furnishing patterns and the delivery dates were extended to allow for the Government's tardiness. The contractor experienced difficulty in obtaining the coated fabric from a supplier and was granted an additional extension. The contractor continued to have problems with the supplier and sent an outside expert to the supplier's plant to assist. The supplier problem precipitated slow deliveries and resulted in the Government issuance of a "show cause" letter on September 12, 1979.

A meeting between the Government and the contractor was held on September 21, at which time the contractor proposed a revised delivery schedule. Additionally, he advised that the supplier problems were improving, additional material was to be procured from another proven

³83-2 BCA: 16,842. Cecile Industries, Inc. ASBCA Nos. 24,600 and 27,625. September 22, 1983. Contract No. DLA 100-78-C-1125.

supplier; that additional facilities were being opened; and that the contractor had hired a new general manager. The Government did not dispute the excusability of any delays, but was solely concerned with receiving deliveries. The Government did advise that it was retaining all rights to terminate, but did not advise that it was going to do so.

On October 17, 1979, the Government made suggested changes to the proposed revised delivery schedule. The contractor agreed to these changes. The contracting officer was dissatisfied with the \$6,000 price reduction as a consideration for revising the schedule, but did not communicate this to the contractor. With the Government's knowledge, the contractor arranged for the new supplier.

The contracting officer decided to reject the proposed revised delivery schedule and to partially terminate the contract for default. In her haste to complete the day's work before a three day weekend, she mistakenly advised the company via a telegram using language which followed that of a termination for convenience.

The contractor understood the correspondence to be a partial termination for convenience. Upon receiving the T for D notice in the form of a contract modification, the contractor responded that since the telegram terminated the same line items for convenience, the Government can not, subsequently, terminate for default.

The Government resolicited the items delinquent from the terminated contract. The terminated contractor was the lowest of six bidders. The Government considered the terminated contractor nonresponsive based upon the unsatisfactory performance of the previous and two other contracts and upon receipt of a pre-award survey citing lack of production capacity and labor resources. When the terminated contractor failed to file for a Certificate of Competency with the Small Business Administration, his bid was rejected as nonresponsive. Excess reprocurement costs left the terminated contractor over \$300,000 indebted to the Government.

(2) Decision. By not exercising its right to terminate for default within a reasonable time, the Government waived that right. The Government urged the defaulting contractor to do everything possible to increase deliveries and made several revisions to delivery schedules, thus relaying the fact that delivery of the ponchos was not "of the essence." If time was of the essence, the only other issue was for the contracting officer to consider if the items were available from another source within the delivery schedules required of the contract. The Board finds no evidence of this concern by the contracting officer, but merely a dissatisfaction with the contractor's proposed price reductions. There was a history of late deliveries, revisions of delivery dates, discussions,

negotiations for price reductions coupled with the Government's encouragement of continued performance.

(3) Point of Law. The result of this case is similar to the previous cases, where the Government's inaction in exercising its rights to terminate and its continued encouragement to perform after the delivery date were inconsistent with its actions of subsequent termination for default.

Having failed to exercise its right to terminate for delinquent deliveries, the Government essentially waived the contract delivery schedule. Without the establishment of a new delivery schedule, there can be no default based upon a non-existent schedule. [Ref. 2:p. 689]

d. Case 4⁴ Government Encouraged Continued Performance

(1) Findings of Fact. The contract was for delivery of a jacketed stainless steel 525 gallon tank in accordance with the Government-furnished drawing. The contract schedule and the drawing provided were inconsistent and resulted in a considerable delay in the Government's approval of the contractor's shop drawings, a condition of the contract. The contract was administered in such a way as to lead the contractor to believe that time was not "of the essence," as evidenced by two delivery date extensions.

⁴83-1 BCA 16,398. Pacific Coast Welding & Machine, Inc. ASBCA No. 26,105. March 7, 1983. Contract No. 200-80-0017.

The contract was currently in default. The Government was aware of the subcontractor's continued performance in providing material for the dimpled jacket portion of the tank, after an extended delivery date had passed. The Government argued that it was aware of the subcontractor's continued performance, but did not interpret that as continued performance by the prime contractor.

(2) Decision. The ASBCA decision was summarized in an except from the historic "De Vito decision":

The necessary element of an election by the non-defaulting party to waive default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate the continued performance by him under the contract, with the Government's knowledge and implied or express consent.

The continued performance by a subcontractor is interpreted as continued performance by the prime contractor because the subcontractor is doing the prime's work. The Government's delay in terminating was beyond a reasonable period of forbearance and therefore waived its right to terminate for default based upon delinquent delivery.

(3) Point of Law. The Government has a reasonable period of time in which to investigate the facts and determine the actions required that would be in the best interests of the Government. Within this forbearance period, the Government can terminate the contract for default. The judgment call is in determining the period of

reasonable forbearance. It varies, depending upon the facts and circumstances of each case. [Ref. 2:p. 688] If the contractor continues to perform, with the Government's knowledge, the Government is obligated to act expeditiously in making its decision to terminate [Ref. 2:p. 689].

e. Case 5⁵ Unconscionably Priced Contract

(1) Findings of Fact. A contractor mistakenly submitted a bid on only one part of a two-part seat assembly. He had previously been awarded ten contracts for part one and one contract for part two, but the two-part assembly had never been procured as a complete unit.

The contractor's bid was 33%, 72%, and 93% lower than the second, third and fourth lowest bidders, respectively. The ACO telephoned the contractor to request he check his price quotation, but there was no mention of the Government's suspicion of bidder's "mistake" or the wide disparity between his bid and the bids received for the other competitors. The contractor had had a contract within the last year for part one of the assembly. His bid on this contract agreed with the unit price bid on this previous award.

The contractor was awarded the contract and discovered his error upon receiving the written contract. The ACO refused his request for a price increase, but the

⁵84-3 BCA 17,599. Manistique Tool & Mfg Co. ASBCA No. 29164. August 14, 1984. Contract No. N00104-83-C-4041.

contractor continued manufacturing of part one of the two-part assembly.

(2) Decision. The contractor's mistake was due to a misreading of the contract specifications, not due to a mistake in business judgment. The bid verification procedure performed by the Government was inadequate. To force the contractor to comply with all the contract provisions would be "unconscionable." The contract is enforceable to the extent of supplying the one part upon which the contractor's bid was based. The contractor is entitled to recovery of all its reasonable costs incurred in supplying the one part of the assembly.

(3) Point of Law. The issue of unilateral mistake must be a clerical or arithmetical error, or a misreading of specifications, but does not extend to mistakes in business judgment. [Ref. 2:p. 229]

The Government is required to notify bidders of suspected errors in their bids. The FAR provides the following guidance:

After the opening of bids, contracting officers shall examine all bids for mistakes. In cases of apparent mistakes and cases where the contracting officer has reason to believe that a mistake may have been made, the contracting shall request from the bidder a verification of the bid, calling attention to the suspected mistake. [Ref. 3:p. 14-13]

The Government must have "knowledge or reason to know" of the mistake [Ref. 2:p. 232]. In the verification process, the contracting officer must call

attention to the suspected mistake and disclose the particular reasons which led to his suspicion of a mistake [Ref. 3:p. 14-14]. The rationale for unconscionability is not to allow the Government to "get something for nothing." A final point on "unconscionability":

If the contractor's mistake results in a contract which is grossly imbalanced, relief may be granted on the theory of unconscionability even if the contractor had verified the bid after appropriate request for verification, 53 Comp. Gen. [Ref. 2:p. 236]

f. Case 6⁶ Government Hindrance

(1) Findings of Fact. The case involved the default termination of contracts 1205 and 1628, however, the case hinges upon a third contract, 749. The contractor was performing all three new contracts. The delivery date of the two terminated contracts was September 1979. Contract 749 was solicited and awarded for delivery of "chlorinated lime" to be used as a deodorizer. Subsequent to award, and just prior to delivery, the Government contented that the material required certification by the Environmental Protection Agency (EPA) for reason of its classification as a pesticide. Thus, the Government would not receipt for nor make a payment on contract 749. The Government had relied upon an outdated reference in arriving at this conclusion.

Several months later, the Government conceded that the EPA certification was not applicable to

⁶82-2 BCA 15,948. Spiritual Scented Sky Products. ASBCA No. 24,507. July 14, 1982. Contract No. DLA400-79-C-1205.

the deodorizing compound. Consequently, the Government authorized payment for contract 749 in late October and, almost simultaneously, issued a default termination on the two other contracts. The contractor contended that the erroneous withholding of payment on contract 749 led to his nonperformance on the two contracts.

(2) Decision. The Board dismissed the Government's argument that the withdrawing of the EPA certification was a contract waiver of the EPA requirement vice an error in requiring the certification. The Government had no right to delay acceptance and withhold payment. The contractor is not responsible for excess procurement costs.

(3) Point of Law. The contractor is generally required to assume the risk of providing sufficient funds to perform a contract. Failure of expected loans to materialize, for instance, would not excuse performance. However, the contractor will be granted relief when the lack of financing is caused by wrongful Government actions. [Ref. 2:p. 414] The contractor must establish that the Government's actions caused the financing problems [Ref. 2:pp. 414-415].

g. Case 7⁷ Unusually Severe Weather

(1) Findings of Fact. The contractor was required to deliver 99,999 board feet of specially treated scaffold planks on or before 28 January 1981. The contractor's supplier had adequate logs, but was delayed in transporting the logs from the forest to the mill by unusual rain and heavy wind damage to the logging road. The Government rejected this claim after its research revealed that the conditions experienced were normal. The Government resolicited and awarded to a reprocurement contractor.

(2) Decision. The Government erroneously relied upon weather data for the lumber mill area and not the logging road areas, which had experienced unusually severe weather. The logging roads were washed-out, mired in mud, and blocked with trees blown down by storms. The contractor's appeal was sustained.

(3) Point of Law. This case exhibits a new interpretation of "unusually severe weather," i.e., exacting the location of performance. "Unusually severe weather is weather that is abnormal compared to the past weather at the same location for the same time of year" (Ref. 2:p. 398]. The two key points in this area of law are the "place of performance" and the "effect upon performance." The place of performance was not the lumber mill, which had normal

⁷82-1 BCA 15,500. J&M Lumber Co. ASBCA No. 25,951. December 10, 1981. Contract No. DLA720-80-C-0910.

weather, but rather, the logging roads located in nearby low-lying areas. This area, close to the coast, had experienced hurricane-force storms. The second key is the effect upon performance. One day of unusually severe weather may excusably delay performance for months, e.g., the storm may damage existing structures and cause the site to be mired in mud for an extended period of time. [Ref. 2:p. 399]

2. Category Two: First Article

a. Case 8⁸ Government Encouraged Continued Performance

(1) Findings of Fact. The contract provided for delivery of 988 portable multifuel space heaters for use in vehicles, such as personnel carriers. First article approval was required. The manufacture of the heater had previously been a sole source procurement to Hunter Mfg. Co. The contractor obtained a Hunter heater and performed a reverse engineer effort. Minor changes and improvements were incorporated and the first article test was approved.

Subsequently, the contractor received several unrelated contracts and, due to plant capacity constraints, decided to accept an offer from Hunter to produce the heaters. The Government contract required the first article and production units to be manufactured by the same source. The Government QA representative, who had approved the assembling and testing of the first articles at the

⁸82-2 BCA 15,981. Precision Products. ASBCA No. 25,280. July 27, 1982. Contract No. DAAK01-78-C-1098.

contractor's plant, made routine visits to the plant in performing his contract oversight duties. Incident to contract performance, the Government was allowed 60 days to review the draft copy of the instruction manuals for the heaters. The smooth manuals were required to accompany the heater deliveries. The Government completed its review seven months after receipt of the initial drafts from the contractor. When the procuring contracting officer became aware that Hunter had been subcontracted to produce the heaters and that the deliveries were overdue, he terminated the contract for default. The Government reprocured the heaters from Hunter Mfg. Co.

(2) Decision. The delay in deliveries was excusable and due to the Government's excessive review period of the manuals while the heaters were ready for shipment. Although the first article and production unit's place of manufacture clearly violated the terms of the contract, the Government waived its right to terminate due to the Government's awareness of this fact. The Government's QA representative is "the eyes and ears" of the contracting officer. He was aware, or should have been aware, that the production was not taking place at the contractor's plant.

(3) Point of Law. The law books are filled with cases that deal with the contracting officer's technical representative, many decisions of which are

contradictory. The focus is upon whether knowledge by a contracting officer's representative is "imputed" to be knowledge by the contracting officer. It is applicable when the "nature of the relationship between the authorized person and the representatives establishes a presumption that the authorized person will be informed" [Ref. 2:p. 39].

b. Case⁹ Government Hindrance

(1) Findings of Fact. The two principal contracts called for manufacturing PRC-77 radios. The other sixteen contracts were for the same item and resulted primarily from options for additional quantities and the award of foreign military sale contracts. The radios were required to be tested on the Government-furnished test equipment, Special Automatic Test Equipment (SATE). The knowledgeable contractor experienced severe difficulties in certifying the radios on SATE, as had several other contractors who had used it. The U.S. Army also reneged on an agreement to allow a single first article test to satisfy the two contracts. The extensive problems associated with the use of SATE caused repeated rejections of the first articles, extensive delays, and eventual termination of the two contracts for default. Those default terminations precipitated the default terminations of the other sixteen contracts.

⁹84-3 BCA 17,543. Bristol Electronics Corp. ASBCA Nos. 24792, 24929, 25135 through 25150.

(2) Decision. The Government's refusal to make equitable adjustments for the contractor's problems derived from the use of the Government-furnished defective test equipment was directly responsible for the contractor's default on the eighteen contracts.

(3) Point of Law. Several issues arise in this case, the two most significant being (1) the Government's implied duty not to hinder (discussed in Cases 6, 8, and 14) by its refusal to make a fair and equitable adjustment, and (2) the Government's responsibility to provide the test equipment "suitable for the intended use" [REf. 14:p. 655]. "A few cases have held it [Government-furnished property] is covered on the theory that defective Government-furnished property is the equivalent of a defective specification" [Ref. 2:p. 282].

c. Case 10¹⁰ Government Encouraged Continued Performance|

(1) Findings of Fact. The contractor was to supply 574 each hoisting slings. The contractor was late in submission of its first article and the Government intended to terminate for default. When the company contacted the contracting officer to advise that the first article would be delivered in one or two days, the contracting officer advised the contractor to "Put that in writing."

¹⁰85-2 BCA 18,043. King's Mfg. Co. Inc. ASBCA No. 27,201. April 3, 1985. Contract No. N00104-81-C-K691.

(2) Decision. By her statement, the contracting officer encouraged continued performance after the delivery date of the first article. This encouragement of performance is legally interpreted as a waiver of the delivery date. With no new delivery date, the contract cannot be terminated for non-delivery until a new date has been established.

(3) Point of Law. (Same as cases 1, 2, 3 and 8).

d. Case 11¹¹: No First Article Approval Clause

(1) Findings of Fact. The contract called for delivery of fiberglass blade spacers that are installed on compressors in wind tunnels. The contractor failed to deliver an acceptable first article and, subsequently, failed to deliver a first production run sample. The contractor consistently advised the Government of progress and proposed solutions. The Government's response was one of encouragement to performance, even after the contractor was in default.

The contract contained no standard First Article Approval clause or equivalent clause under which a default termination could be exercised for failure to deliver acceptable first articles. Contractor performance, with Government encouragement, continued beyond the delivery

¹¹85-2 BCA 18,059. Composites Horizons. ASBCA No. 25,529 and 26,471. April 18, 1985. Contract No. F40650-79-C-0007.

date. The contract was terminated for failure to timely provide the first article and initial production for testing.

(2) Decision. Having omitted the First Article Approval clause from the contract, the Government could not cite lack of an acceptable first article submission as justification to terminate the contract for default. The Government's encouragement of performance beyond the delivery date is, in fact, a waiver of the delivery schedule.

(3) Point of Law. Similar to Cases 1, 2, 3, 10.

e. Case 12¹² Government Hindrance

(1) Findings of Fact. The contract was for forty-six printed circuit boards. Sixty-six drawing numbers were referenced in the solicitation, however, these drawings were not distributed as part of the solicitation. The contractor realized this, but felt it was unnecessary for submission of his bid.

Subsequent to contract award, the Government was unable to locate the drawings. The Government contends that, having discovered that the solicitation lacked the referenced drawings, the contractor should have notified the Government of that fact.

¹²84-3 BCA 17,677. Amplitronics, Inc. ASBCA No. 29,629. September 13, 1984. Contract No. N00104-82-C-K723.

(2) Decision. The Government was correct in its contention that failure to notify the Government of the omission of drawings amounted to the contractor's assumption of increased risk. However, the contractor acted in accordance with the Government's established policy of never including drawings with solicitations, but furnishing the necessary drawings after award. The Government agreed that the drawings were necessary for production of the circuit boards. The contract is converted to a termination for the convenience of the Government and remanded to the parties for negotiation as to monetary settlement costs.

(3) Point of Law. This case has yielded a new interpretation of solicitation requirements and rests upon the Government's implied duty "not to hinder." The Government was not in possession of the required drawings and sought to transfer additional performance risk to the contractor. If an action by the Government is required for contract performance, lack of that action is a breach of its implied duty to cooperate. [Ref. 2:p. 212]

f. Case 13¹³ Substantial Compliance

(1) Findings of Fact. The contract called for delivery of 126 radio interference filters. The first articles failed a temperature and immersion test (the units leaked). The units passed essentially all other

¹³82-1 BCA 15,505. FIL-COIL Co. Inc. ASBCA Nos. 26,101 and 26,329. December 11, 1981. Contract No. DLA900-80-C-0284.

requirements. The contractor responded to a "show cause" notice that the problem had been identified and corrective steps had been taken to correct the defects. A new delivery was negotiated.

In discussions with the contracting officer, not in the presence of the Government's engineer responsible for technical approval, the contractor was led to believe that resubmission for first article testing would be necessary only for the temperature and immersion test. Minor deficiencies, again, resulted from the testing procedure. The Government terminated for default based upon the contractor's inability to produce an acceptable first article.

(2) Decision. Although the filters submitted for testing did not fully comply with the contract specifications, they did substantially demonstrate the contractor's ability to perform the contract. The Government was not obligated to accept the non-conforming items, but was obligated to allow the contractor an opportunity to cure the deficiencies.

(3) Point of Law. A failure to deliver acceptable first articles or prototype is not a failure to deliver supplies. The purpose of submitting a first article is to demonstrate the contractor's technical ability to comply with the contract. The "substantial compliance" principle is the focal point with first article testing.

Major deficiencies in first article testing require a "cure period" to permit the contractor to correct defects. [Ref. 2:pp. 655-657]

g. Case 14¹⁴ Substantial Compliance

(1) Findings of Fact. The contract provided for delivery of eighteen 20-mm gun booster fitting assemblies. The first articles were rejected for relatively minor defects. The contractor corrected all the noted defects and submitted a second first article. This time it was rejected for defects that were not noted on the first testing and were minor in nature. An ambiguous specification on a drawing and an erroneous measuring technique performed by the Government inspector contributed to the rejection of the second submission. The Government terminated for default due to the contractor's inability to furnish the required first article.

(2) Decision. The defects were minor in nature and could have been remedied quickly and at a small cost. The purpose of the "first article" requirement is to demonstrate the contractor's understanding and "Know-How." The Board summarized concisely:

Deficiencies in a first article that are correctable in production are not a valid basis for an outright disapproval of a first article, and in recognition of this, the first article approval clause expressly provides for conditional approval.

¹⁴82-2 BCA 16,830. Dunrite Tool & Die, Inc. ASBCA No. 27,538. August 23, 1983. Contract No. F09603-80-C-4500.

(3) Point of Law. No new laws or interpretations of established law were demonstrated in this case, merely a reiteration of the principles presented in the previous case.

3. Category Three: Anticipatory Repudiation

a. Case 15¹⁵ Unfounded Unequivocal Manifestation of Contractor's Intention not to Perform

(1) Findings of Fact. A Blanket Purchase Agreement (BPA) called for the supplying of beef to the commissary system operated by the U.S. Forces in Europe. Defense Subsistence Region Europe (DRSE) solicited offers and accepted the bid of Martin Suchan. Contract awards preceded deliveries by only two or three weeks. The contractor had never received such a large contract for delivery of beef. This required the contractor to increase his credit line and to place an unusually large order with his supplier. The rising beef prices prompted negotiations between the contractor and his supplier. These complications eroded the contracting officer's confidence in the contractor's ability to deliver. Through the post-award discussions and difficulties the contractor kept the contracting officer apprised of developments; stated he was confident that he would resolve his problems; but refused to state unequivocally that he would not deliver the beef.

¹⁵83-1 BCA 16,323. Martin Suchan. ASBCA No. 22,251. February 8, 1983. Contract No. DSA 139-76-A00002.

In consideration of all the facts available and his interpretation of the contractor's statements, the contracting officer terminated the contract for default due to the contractor's "stated inability to deliver." Subsequently, but prior to the first delivery date, his credit line was increased and his supplier was in a position to provide the beef.

(2) Decision. As stated in the Dingley v. Oler case of 1886,

The hallmark of anticipatory repudiation is that there must be a "definite and unequivocal manifestation of intention on the part of repudiator that he will not render the promised performance when the time fixed for it in the contract arrives." Corbin on Contracts § 973. Therefore, to constitute an anticipatory repudiation the alleged repudiators' words of conduct must manifest a "positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time."

The record established without a doubt that Suchan did not tell the contracting officer that he would not perform in accordance with the terms of the contract. The contractor's actions in informing the contracting officer of difficulties can not be interpreted as an inability or refusal to perform.

(3) Point of Law. The "anticipatory repudiation" doctrine rests upon the contractor's "definite and unequivocal manifestation" not to perform in accordance with the terms of the contract [Ref. 2:p. 678]. This occurs when the contractor:

1. Refuses to perform.
2. Expresses intention not to perform.
3. States inability to performance or the facts clearly show inability to perform. [Ref. 14:p. 528]

The doctrine is founded upon the Uniform Commercial Code and holds that to wait until the appointed time of contract nonperformance would "unduly penalize" the buyer when it appears the contractor cannot or will not perform. [Ref. 15:p. 528]

The issues involved in an anticipatory repudiation often require difficult judgmental decisions. For example, a contractor's appeal was sustained, 71-1 BAC § 8,700 (1971), when the contractor filed for bankruptcy and failed to commence work as promised. The bankruptcy trustee stated that the contractor had the necessary equipment and capability to perform. In another case the contractor's appeal was sustained, 82-2 BCA § 15,881 (1982), when the contractor sent a letter informing the contracting officer that financial difficulties had forced him to suspend manufacturing operations, but that he was "actively trying to resolve the financial problems." In one particularly interesting case, 71-1 BCA 8690 (1971), the "contractor used abusive language to a Government official, agreed that the contract should be cancelled, and stated that he neither cared about nor wanted the work." This contractor's appeal was also sustained by the Board. [Ref. 2:p. 685]

V. ANALYSIS OF SUSTAINED APPEALS

A. INTRODUCTION

The information from Chapter IV will be analyzed for the reasons the contracting officer cited in terminating the contract for default and the justifications cited by the Board in sustaining the contractors' appeals. Refer to Table 2 for a summary of this information. Due to an overlap between Chapter IV's Category 1 (Failure to Make Delivery) and Category 2 (First Article), the first section is appropriately titled "Failure to Deliver." After a brief presentation of the magnitude of the total "failure to deliver" aspects of the sample cases, this chapter presents an analysis of the major principles, cited by the ASBCA, for sustaining the contractors' appeals. The format of this section is a discussion of the principles of law and the associated requirements followed by a discussion of the particular actions in the cases which correlate to these principles. The third area of analysis focuses upon the individual characteristics of the cases, i.e., contract size, unit prices of supplies, and the time between the T for D action and the Board's decision. These data are summarized in Table 3.

B. FAILURE TO DELIVER

The default clauses identify three different grounds for terminating a contract for default:

1. Failure to deliver the product or complete the work of service within the stated time period,
2. Failure to make progress in prosecuting the work which endangers timely completion, and
3. Breach of "other provisions" of the contract. [Ref. B:p. 640]

In addition to the three justifications listed above, "failure to proceed" and "anticipatory repudiation" are common law remedies to terminate for default [Ref. B:p. 640]

Referring to Table 2, a combination of Categories 1 (Failure To Make Delivery) and 2 (First Article) represent the total number of sample contracts that were terminated for not delivering the requirements on or before the contract delivery date. This total represents over 93 percent, fourteen out of fifteen, of the sample. The one other case, Case 15, involved an anticipatory repudiation. It is noteworthy to observe that cases which cited the other three justifications (failure to make progress, breach of "other provisions," and failure to proceed) were not found in the sample.

C. JUSTIFICATION FOR CONVERSION TO "T FOR C"

1. Government Encouraged Continued Performance

Where the Government allows a contractor to continue performance past the delivery date, it surrenders its

TABLE 2

A COMPARISON OF THE BASIS OF THE DEFAULT
TERMINATION TO THE REASON FOR THE CONVERSION

<u>BASIS FOR TERMINATION FOR DEFAULT</u>							
ARMED SERVICES BOARD OF CON- TRACT APPEALS REASONS FOR CONVERSION	1.	Failure to Make Delivery	2.	First Arti- cle	3.	Antici- patory Repudi- tion	%
Govt' Encour- aged Continued Performance		1,2,3,4		8,10,11			46.7%
Unconscionably Priced Contract	5						6.7
Contract Con- tained No First Article Approval Clause				(11)			0
Gov't Hindrance	6			9,12			20.0
Substantial Compliance				13,14			13.3
Anticipatory Breach Unfounded						15	6.7
Excusable Delay	7			(8), (9)			6.7
Percentages	46.7%			46.7%		6.7%	

Source: Researcher's summarization of ASBCA research cases.

Note: The numbers represent individual case numbers, not quantities.

The numbers in parentheses represent secondary reasons for conversion to T for C and are not counted in computing the percentages. Numbers w/o parenthesis are the primary reason for the conversion.

Percentages do not add to 100% due to rounding.

alternative and inconsistent right to terminate under the Default clause. This assumes that the contractor has not abandoned performance and a reasonable time period has passed since the delivery date. [Ref. B:p. 685] This election to permit continued performance can be done through inaction as well as by the intentional or unintentional actions taken by the Government. The proof for this defense by the contractor also requires that the contractor place a reliance upon the Government's encouragement to continue performance to his detriment. This reliance is often evidenced by continuing to incur costs in connection with continued performance under the provisions of the contract [Ref. B:pp. 690-694].

In three of the seven cases, in which the Government encouraged continued performance, active steps taken by contracting officers and their representatives were relied upon by the Board in rendering their decision. In Case 1, the PCO exercised a contract option while the ACO was in the process of terminating for default. In Case 2, the Government's QA representative performed an acceptance inspection after the scheduled delivery date. In Case 10, the contracting officer advised a defaulting contractor to place his "one or two day" delivery proposal in writing. This response was interpreted by the Board as encouragement of continued performance.

Inaction by the Government was cited by the Board as the justification for converting the remaining four cases to terminations for convenience. In Cases 3, 4, and 11, the Government attempted to terminate for default at a point beyond the reasonable time period in which it should have taken such action. The circumstances of Case 8 involved the "eyes and ears of the contracting officer," a Government QA representative. The contracting officer had been aware, or should have been aware through his representative, that the first article units and the production units were not manufactured at the same facility as required by the contract. Failure to take immediate action upon learning of this fact waived the Government's right to subsequently use it as a basis for a default termination.

Thus, in nearly half of the cases (46.7%), the Government attempted to exercise its right to terminate for default when it had previously waived its rights to do so.

2. Mistake

A unilateral mistake by the contractor may be grounds for relief if the Government knew, or should have known, of the error. The requirements for relief are (1) a determination whether the alleged mistake is the type for which relief is granted, and (2) that the Government should have known of the error. The reason for which relief of a unilateral mistake is granted fall into two categories, misreading specifications and clerical or arithmetical

errors. In determining whether the Government knew, or should have known of the mistake in a contractor's bid, rests upon the adequacy of the verification request. If a contracting officer knows or suspects a mistake, he must notify the offeror to call attention to the suspected error. According to FAR para. 14.607(c)(1), the contracting officer must "point out the suspected mistake or otherwise identify the area of proposal where the suspected mistake is" and request verification. [Ref. B:pp. 223-236]

The circumstances of Case 5 are straight from the textbook, i.e., the mistake was proven from the contractor's recent performance of a contract thought to be of the same nature. The Government's bid verification request failed to call attention to the specific area in which the suspected error was located, but took the form of "Double check your bid and tell if it is correct" request. This case was the only one of this nature and does not merit additional analysis.

3. Contract Lacked First Article Approval Clause

Failure to deliver acceptable preproduction items, e.g., first articles and prototypes, is not a failure to deliver supplies [Ref. B:p. 655]. To overcome this limitation, the FAR provides the First Article Approval clause (para. 52.209-3 & -4) to use with such contracts.

No such clause was used in Case 11, but the Government still attempted to use it as a secondary justification

for its T for D action. The primary reason for terminating was discussed in Section 1 above, Government Encouraged Continued Performance. In consideration of the nature of the case and its single occurrence, further analysis would not serve in the research effort of identifying frequent problems in the acquisition process.

4. Government Hindrance

A contractor's performance can be affected by the Government's action or inaction, causing performance to be more costly or difficult. If the Government's action is wrongful, it will have breached its implied duty to cooperate and not to hinder or interfere with the contractor's performance [Ref. B:p. 212]. To recover, the contractor must prove a causal relationship to the problems encountered [Ref. B:p. 213]. The providing of defective Government-furnished equipment can be viewed as a hindrance as can a defective specification [Ref. B:p. 655].

In Case 6, the Government's erroneous requirement for an Environmental Protection Agency (EPA) certification prior to acceptance and payment in the performance of another contract directly caused the contractor's financial difficulties that led to his nonperformance on two other contracts. During the preaward survey the proceeds from the first contract were clearly linked to the successful completion of the terminated contracts, thus the causal relationship was satisfied. In Case 9, the required use of the

Government-furnished equipment, which subsequently proved to be defective, caused the nonperformance beyond the delivery date of several related contracts. Another example of Government hindrance was presented in Case 12. The contractor based his bid upon a solicitation which contained none of the drawings necessary for manufacturing the circuit boards. During the post-award period, the Government could not locate the drawings, but insisted upon performance. Normally, the contractor should have requested the missing drawings and by bidding on a contract with no drawings, the contractor assumed all the cost risks of performance. However, since the issuance of solicitations without drawings was the standard procedure, the Government's refusal to provide them to the contractor upon award was a violation of the Government's implied duty to cooperate. This area was considered significant for represented 20 percent of the total cases analyzed.

5. Substantial Compliance

As stated in Section 1, a failure to deliver acceptable first articles is not a failure to deliver supplies. The proof rests upon an evaluation of the significance of the defects present in the first article units provided by the contractor. Minor defects do not justify rejection of the first articles, but should result in a qualified acceptance. [Ref. B:pp. 655-656] In Cases

13 and 14, by the Government's admission during the Board's proceedings, the defects were minor in nature.

6. Anticipatory Repudiation Unfounded

The research yielded only one pertinent case in which the Government terminated for default on this basis. The case is not considered a recurrent problem. As discussed in Chapter IV, Case 15, The Government must prove that the contractor refuses to perform, expresses an intention not to perform, or states an inability to perform or the facts clearly show that inability [Ref. 15:p. 528]. The difficulty lies in establishing the contractor's "definite and unequivocal manifestation" not to perform in accordance with the term of the contract [Ref. 15:p. 528].

7. Excusable Delay

The purpose for an excusable delay clause is to protect the contractor from penalties of late performance and to permit additional compensation if the Government constructively accelerates performance [Ref. 2:p. 389]. FAR para. 52.249-8 provides that, except for defaults of subcontractors, the contractor shall not be terminated for default nor held liable for excess costs if failure to perform the contract was from causes beyond his control and without his fault or negligence [Ref. 2:p. 389]. To qualify for an excusable delay, the excuse must have:

1. been beyond the contractor's control and not a result of his negligence,

2. been unforeseen and he could not have been expected to foresee, and
3. caused the delay [Ref. 2:pp. 391-396].

The excusable delay in Case 7 was one of "unusually" severe weather. The weather must have been unusually severe for the time of year and the location of performance, which was unforeseen and beyond the contractor's control, and not caused by his negligence. In Case 7, the error was made by the Government when it fixed the location of performance as just the lumber mill vice including the logging roads over which the logs were to be transported. The Board cited excusable delay as a secondary reason for sustaining the contractor's appeals in Cases 8 and 9. In Case 8, the Government was permitted, by the contract, to review the manuals for up to 60 days prior to returning them to the contractor. This review lasted seven months. In Case 9, the contractor qualified for an excusable delay as a result of his reliance upon the Government-furnished test equipment, which later was determined to be defective. With the inclusion of secondary reasons for the Board's decision, this area represents 20 percent of the sample case conversions.

D. COMMON CHARACTERISTICS

The cases were analyzed in an attempt to identify characteristics that appeared frequently throughout the research. The attempt was to identify those areas in which

TABLE 3

SUMMARY OF CONTRACT CHARACTERISTICS

Case #	Supplies	Contract Value (\$)	Unit Cost (\$)	Award Date	T for D Date	Board Decision Date	Duration of Dispute
1	Rebuilt Engines	4,412,520	3,748	9/74	3/75	10/85	127
2	Light Hoods	29,524	121	10/83	8/84	1/85	5
3	Ponchos	1,867,771	12	8/78	11/79	9/83	46
4	Storage Tank	14,280	14,280	3/80	3/81	3/83	24
5	Seat Assembly	39,931	166	12/82	12/83	8/84	8
6	Chlorinated Lime	929,817	22	4/79	11/79	7/82	44
7	Wooden Planks	113,520	1	9/80	4/81	10/81	6
8	Space Heaters	1,043,907	1,057	2/78	6/80	7/82	25
9	Radios	6,107,966	563	11/77	2/80	7/84	53
10	Hoist Slings	188,938	329	7/81	5/82	4/85	35
11	Blade Spacers	190,305	1,627	7/79	7/80	4/85	57
12	Circuit Boards	85,100	1,850	8/82	4/84	9/84	5
13	Radio Filters	12,746	101	12/79	4/81	12/81	8
14	20-mm Booster fitting	9,820	340	9/80	5/82	8/83	15
15	Beef	858,289	1	7/19/77	7/27/77	2/83	67

Source: Researcher's summarization of sample ASECA cases.

Note: Date format is month/year, except Case 15 which is month/day/year.

Duration of dispute is in months.

the Government experiences frequent difficulties when terminating for default. Those common characteristics are enumerated in Table 3 and presented below:

1. Low Unit Price--The highest unit cost was for \$14,280, followed by \$3,748. All others were less than \$2,000 per unit.
2. Low Contract Price--Eleven of the fifteen cases analyzed were less than \$1 million.
3. Duration of the Dispute--The average time elapsed between the termination for default action and the Board's decision was 40.4 months for contracts exceeding \$100,000, but just 10.8 months for those under \$100,000.
4. Non-complex materials--With the possible exception of the blade spacers for wind tunnel compressors in Case 11, all of the supplies listed in Table 3 were not of a sophisticated nature.

VI. CONCLUSIONS AND RECOMMENDATIONS

A. PREFACE

Although fifteen cases over the course of four years certainly does not lead the researcher to believe that the Government's procedures in executing terminations for default is seriously flawed, the research accomplished in this study identified several deficiencies in this process. These deficiencies are presented in the conclusions cited in this chapter. The recommendations portion will address the identified shortfalls, followed by a discussion of the research questions and suggestions for further research.

B. CONCLUSIONS

1. Conclusion 1

The problems identified are not a result of new policies, regulations, and interpretations of previous Board decisions, but are basic principles of contract administration, such as, estoppel, Government hindrance, substantial compliance, and excusable delay.

The deficiencies noted were in the basic principles of which every warranted contracting officer should have a thorough working knowledge. Seven of the fifteen total cases analyzed were overturned by the Board because the Government had previously waived its rights to exercise a

default termination. Four of the seven decisions resulted from Government inaction.

The principle of Government Hindrance was cited in twenty percent of the cases. Two of the three cases were determined by erroneous Government actions in administering other contracts.

Thirteen percent of the cases involved the principle of substantial compliance applied to contracts involving first article units. In consideration of the current Government commitment to increasing competition through break-out procedures, dual sourcing, and other methods, the difficulties associated with administering a growing number of first article contracts can only be expected to multiply.

2. Conclusion 2

Many case decisions precipitated from a general lack of communications.

This problem was directly responsible for four (26.7 percent) of the contracting officer's T for D actions being converted to convenience terminations.

In Case 1, the ACO should have advised the PCO that he was proceeding with a T for D action. In Cases 2 and 8, the Government QA representative's actions were not relayed to the contracting officer who was held responsible for this knowledge.

The contracting officer's erroneous advice to the contractor producing a first article unit, prior to

consulting with the Government's program engineer, was grounds for sustaining the contractor's appeal in Case 13.

3. Conclusion 3

The contracts are characterized by low unit cost, low contract value, and deliverables of a non-complex nature.

An analysis of Table 3 reveals that all the unit costs were under \$15,000 and eight-six percent were under \$2,000. Seventy-three percent of the contracts had a value of less than \$1 million.

With the possible exception of the blade spacer contract, the supplies can be characterized as low-tech, routine purchases.

4. Conclusion 4

The higher dollar value contracts are involved in the disputes process for a much longer period of time than are the low dollar value contracts.

As stated in the Chapter V, Section D analysis, the contracts valued in excess of \$100,000 are in the disputes process for an average of 3 1/2 years, while the average time in disputes for contracts valued at less than \$100,000 is eleven months. This could be a result of contractors with lower value contracts choosing the expedited or accelerated procedures of the ASBCA, which are designed for the low value claims.

C. RECOMMENDATIONS

1. Recommendation 1

Increase the degree of communications between the members of the acquisition team.

Measures need to be implemented to preclude the situation, exhibited in Case 1, in which the ACO had commenced a default termination while the PCO simultaneously exercised a contract option to increase the number of deliveries. The general lack of communications between the ACO and the Government's QA representative led to sustained contractors' appeals in Cases 2 and 8. Adding Case 13 to this category brings the total to nearly 27 percent of the total sample cases analyzed. A coordinated team effort would present a true "single face to industry." The solution to this problem could be as simple as stressing the need for active communications and the citing of documented problem cases in contracting officers' basic contracting education process.

2. Recommendation 2

Increase the degree of expertise and contract awareness of acquisition personnel at all levels.

It is evident from the research that contracting officers and their representatives are not consistently applying basic contract knowledge in the decision-making process. The application of this knowledge in the Waiver of Government's Rights and in the Substantial Compliance

aspects of first article testing procedures would have reduced the number of cases in this study by over half. Possible causes of these errors would include: Lack of training and education, understaffing, inadequate supervision, poor legal or other advice, and/or insufficient management aids, e.g., computerized contract monitoring systems.

3. Recommendation 3

Contracting officers must be made aware of the requirement to be decisive, particularly in areas that would impact the grounds for a default termination, through the training, career development, and evaluation processes.

The need for prompt action is supported by the four cases, in Chapter V.C.1, in which inaction by the contracting officer waived the Government's right to subsequently terminate for default based upon the contractor's delivery delinquencies.

4. Recommendation 4

Implement a contract management information system that would increase the visibility of contract delivery dates and current status.

This system would not necessarily be designed to favorably impact the contractors' compliance with schedule delivery dates, but it would increase the awareness of the Government acquisition personnel of contracts that are in or approaching default. This awareness could reduce the

occurrences of unintentional encouragement of continued performance.

5. Recommendation 5

Conduct an evaluation of the quality of legal advice that the contracting officers are receiving when deciding to terminate a contract for default.

The decision to pursue a termination for default action is the responsibility and decision of the contracting officer. However, in making that decision, he relies upon the information he has gathered and the advice he has received. Once he has gathered all the available information, a primary person from whom he solicits advice is the lawyer. The legal issues in the majority of the cases analyzed were clear and not subject to a court's new interpretation of contracting principles of law. In the opinion of the researcher, the cases never should have gone to the Board for a resolution. With improved legal advice, the occurrence of T for D conversions by the Board or Court could be dramatically reduced.

D. RESEARCH QUESTIONS

1. Primary Research Question

Can meaningful conclusions be drawn from an analysis of sustained ASBCA and U.S. Claims Court appeals concerning Department of Defense contracts which were originally terminated for default (T for D), but subsequently settled

as terminations for convenience (T for C) as a result of an agency board or judicial decision?

It is feasible to draw meaningful conclusions that will improve the acquisition process using the methodology of this research.

The analysis uncovered several areas in which better Government performance in contact administration could reduce the number of erroneous actions identified through this research, such as, an increase in basic contracting knowledge, communications, and decisiveness. A complete explanation is contained in the Recommendations section of this chapter.

2. Subsidiary Question 1

What are the principles generally cited for sustaining a contractor's appeal of a default determination?

The most frequently cited ASBCA decisions for sustaining a contractor's appeal are, in descending order, Government Encouragement of Continued Performance, Government Hindrance, and Substantial Compliance.

As shown in Table 2, the frequencies of occurrences are 46.7 percent, 20.0 percent and 13.3 percent, respectively. Of the seven cases in which the contractor's performance was encouraged beyond the schedule delivery date, four were a result of inaction by the Government while two of the other three involved actions by the contracting officer's representative. A particularly interesting aspect

of two of the three cases involving hindrance was that these successful appeals resulted from the Government's wrongful actions in administering other contracts. The two cases citing substantial compliance as justification for sustaining the contractor's appeal exhibited a general misunderstanding of the principle of law when applied to contracts involving first article units. A more in-depth discussion of the individual cases is presented in Chapter V.C.

3. Subsidiary Question 2

Once a contract termination is successfully appealed, what are the contracting officer's options and associated considerations?

In some instances, the Board or Court will direct specific actions and dollar remedies in their decision. In these cases, the contracting officer has no options since his actions have been directed, specifically. However, with most agency or court decisions, the contracting officer does have possible options through which to resolve the contractual relationship.

1. The Government has the right to appeal a Board or Court decision to the Court of Appeals for the Federal Circuit. [Ref. 2:p. 955]
2. If the contract performance has not commenced, a recission of the contract could be issued to excuse the contractor [Ref. 2:pp. 238-241]. A recission is normally associated with contractors' claims of "mistake" and usually directed by the Board or Court when applicable.

3. Reinstatement. The parties are always free to reinstate the contract, regardless of the stage to which the dispute has progressed. Although this option is infrequently exercised, it can be of mutual benefit to the Government and the contractor [Ref. 2:p. 709]. It may be especially applicable to contracts erroneously terminated when the first article unit did substantially comply with the contract's requirements.
4. Reformation. If the parties can agree, the contract can be reinstated and modified to require only partial, or other-wise modified, performance [Ref. 2:pp. 238-240].
5. Proceed with the Termination for the Convenience of the Government in which the Government admits the mistake and assumes the obligations of payment of allowable and allocable costs and profit on costs incurred.

Reformation and reinstatement require a negotiated agreement as to the necessary contract modifications, but still require the contractor to deliver the supplies. The only option listed above, other than proceeding with the T for C, that was evidenced from the cases, was a reformation in Case 5. The contractor's bid was based upon only one part of a two part assembly. The contract was reformed to permit the contractor to build, and receive payment for, only the one part.

Normally, the contracting officer has few available options, therefore his considerations require no evaluation. A contractor who has failed to deliver the contracted supplies will be hesitant to commit himself to such an arrangement and will often choose the T for C, in which case he is "made whole." However, in those rare instances in which the contractor and the Government desire to complete

the contract, the contracting officer must first evaluate the situation by answering the same questions he asked when making the original decision to T for D.

Regardless of the course of action chosen, the decision must be made in accordance with the provisions of the Board or Court's decision, coordinated with higher authority, and serve in the best interests of the Government.

4. Subsidiary Question 3

How might the T for D decision process be improved to reduce the number of successful contractor appeals?

An in-depth discussion into the requirements for making improvements to the decision process are presented in the Recommendations Section of this chapter, such as, improved communications, increased knowledge and awareness, decisive action, a contract administration management information system, and better legal advice.

E. RECOMMENDATIONS FOR FURTHER RESEARCH

This analysis illuminated several deficiencies in the Government acquisition process. However, since the research was limited in scope and methodology, many other areas that also promise fruitful results are presented below:

1. Research the degree to which T for C's are exercised vice a T for D as a result of the Government sharing a high degree of responsibility for the contractor's performance difficulties.

2. Research the feasibility of increased automation in the contract administration function, as presented in Recommendation 4.
3. Evaluate the practical application of default models to the acquisition process with a focus on the identification of early warning signals.
4. Evaluate the existing professional relationship between ACO's and PCO's, focusing on the degree and quality of communication.

APPENDIX A

REPORT OF TRANSACTIONS AND PROCEEDINGS OF THE ARMED
SERVICES BOARD OF CONTRACT APPEALS FOR THE FISCAL
YEAR ENDING 30 SEPTEMBER 1985

ARMED SERVICES BOARD OF CONTRACT APPEALS
200 Stovall Street
Alexandria, Virginia 22332-0700

31 October 1985

MEMORANDUM FOR: THE SECRETARY OF DEFENSE
THE SECRETARY OF THE ARMY
THE SECRETARY OF THE NAVY
THE SECRETARY OF THE AIR FORCE

SUBJECT: Report of Transactions and Proceedings of the
Armed Services Board of Contract Appeals for the
Fiscal Year Ending 30 September 1985

This report is furnished pursuant to paragraph 9 of Charter for the Armed Services Board of Contract Appeals, 1 July 1979. The statistics hereinafter set forth reflect the hearing, consideration and determination of appeals originating in the Army, Navy, Air Force and DLA and other Defense agencies. They also include appeals docketed by ASBCA for and at the request of the Department of State, the Agency for International Development, the Department of Health & Human Services, and the Office of Personnel Management, all on a full-time basis; and some other agencies on an ad hoc arrangement.

2. The following statistics cover activities of the Board during the report period, and the current reserve of pending matters:

A. Appeals docketed during FY 1985 (Including 32 reinstatements)	1638
B. Appeals disposed of during FY 1985	1293
C. Number of Cases Pending July 1, 1961	1040
Number of Cases Pending July 1, 1962	894
Number of Cases Pending July 1, 1963	838
Number of Cases Pending July 1, 1964	822
Number of Cases Pending July 1, 1965	807

Number of Cases Pending July 1, 1966	875
Number of Cases Pending July 1, 1967	873
Number of Cases Pending July 1, 1968	911
Number of Cases Pending July 1, 1969	899
Number of Cases Pending July 1, 1970	1123
Number of Cases Pending July 1, 1971	1265
Number of Cases Pending July 1, 1972	1254
Number of Cases Pending July 1, 1973	1197
Number of Cases Pending July 1, 1974	1127
Number of Cases Pending July 1, 1975	1065
Number of Cases Pending July 1, 1976	1031
Number of Cases Pending October 1, 1977	1134
Number of Cases Pending October 1, 1978	1163
Number of Cases Pending October 1, 1979	1221
Number of Cases Pending October 1, 1980	1259
Number of Cases Pending October 1, 1981	1301
Number of Cases Pending October 1, 1982	1594
Number of Cases Pending October 1, 1983	1695
Number of Cases Pending October 1, 1984	1729
Number of Cases Pending October 1, 1985	2074
Net Increase in Docket, FY 1985	345

D. Source of Appeals Docketed During FY 1985:

Army	606
Navy	430
Air Force	366
DLA	152
Other DoD	<u>4</u>
	1558

Special

State	1
HHS	33
AID	3
Office of Personnel Management	1
Defense Mapping Agency	6
Defense Nuclear Agency	4
Reinstated	32

E. Of Appeals Disposed of:

Withdrawn	25
Sustained, Denied, Compromised, or Dismissed after Substantial Board Proceedings	<u>1268</u>
	1293

F. Status of Cases Pending End of FY 1985:

Complaint Due	540
Answer Due	217
Reply Due	0
Discovery Start	281
Prehearing Conference	13
To Be Set	441
Hearing Set	152
Transcript & Briefs Due	152
Suspense	131
Ready to Write	<u>147</u>
TOTAL	2047
Rule 12	122

G. Summary since May 1, 1949 (date of creation of ASBCA from predecessor boards)

Docketed	31,802
Reinstated	<u>640</u>
	32,442
Disposed of	<u>30,368</u>
	2,074

The conclusion of Fiscal Year 1985 reflects that once again the ASBCA has received a record number of new appeals. For the first time in the history of the Board the number of pending appeals exceeds two thousand. The magnitude of the workload leads to two inescapable conclusions. First, additional personnel must be authorized. Second, the Board must develop internal procedures which permit the parties under appropriate appeals to opt for "Prompt Procedures."

In June of 1985, a comprehensive "ASBCA Management Improvement Plan" was prepared by an ASBCA committee as justification for additional resources and submitted by the then Acting Chairman to the General Counsel of the Department of Defense. The plan discussed the current staffing of the Board, provided justification for additional personnel positions and associated space and equipment, analyzed the status of the Board's docket, detailed internal controls to better manage the docket, and calculated future work load projections based on historical data. The plan further detailed steps already taken or in the process of being taken to change methods of processing appeals to improve productivity. Emphasis was placed on disposing of the oldest ready-to-write appeals on our docket. This goal has now largely been accomplished. However, this has resulted in a large build-up of pending appeals which must be heard. The plan uniformly received positive comments and indicated efforts to implement the Columbia Technology management study recommendations made in December 1983.

However, the plan was held in abeyance pending the completion of the process for selecting a new ASBCA Chairman.

On 1 October 1985, the undersigned was appointed as the new Chairman. As chairman, I have, amongst other actions, initiated the following changes:

- revised the docket assignment system to more evenly balance the work load and have begun intense docket reviews and docket adjustments;
- redefined the Commissioners work assignments to help relieve the Judges from numerous administrative docket functions;
- revised the Rule 12 docket processing system to balance the work load and to continue to insure substantial compliance with time deadlines;
- reassigned computer terminals to improve efficiency; (in the immediate future a new, expanded computer system will be installed which will permit each Judge access to a terminal including capability for automated legal research); and
- initiated procedures on a trial basis, subject to the approval of both parties, for prompt processing of appropriate cases.

Many of the above mentioned "changes" are cosmetic, temporary stop-gap measures, preliminary or experimental steps designed to immediately improve working conditions and productivity. However, insufficient number of personnel and inadequate office space are limiting constraints which severely restrict any significant improvement in productivity. I have every reason to believe that needed resources will be approved as soon as a management plan is formally submitted to DOD for approval. The filling of existing vacant billets, which includes three Administrative Judge positions, and the submission of a revised management plan are the Board's top priorities. Nominations for at least two of the vacant judge positions and the management plan will be submitted by 1 December 1985.

On 23 September 1985, the General Accounting Office issued its final report [GAO/NSIAD-85-102] on its review of the ASBCA. GAO concluded:

Although the Board is not organizationally independent of the Department of Defense, no centralized control over the Board's activities is exercised within the

Department. Further, the Board is perceived by members of the contracting community to be independent in its decision-making process.

However, members of contract appeal boards are not as insulated as they could be from agency control. Members are appointed and the Office of Personnel Management maintains can be removed by the agencies which bring disputes before the boards. Other employees who perform quasi-judicial functions like board members are selected from a government-wide register and can be removed only by the Merit Systems Protection Board. Legislation should be considered if the Congress wants to insulate board members from agency control to the same degree as other quasi-judicial employees.

The Board has issued Interim Procedures for processing applications of attorney fees filed pursuant to the Equal Access To Justice Act (Section 504 of Title 5 of the United States Code). The EAJA imposes strict jurisdictional deadlines for the filing of applications and for the data required to be filed with the application. The EAJA includes numerous procedural and substantive issues which are not clearly resolved and may initially cause an undue burden on the Board's limited resources.

While the statistical data on its face doesn't appear to bode well for the Board, there are a number of positive signs that are very encouraging to me. Since the effective date of the Contracts Disputes Act of 1978, the number of docketed appeals has nearly doubled. There were 1221 pending appeals as of October 1979. During this same time, the number of ASBCA judges, which was recognized in 1978 as being too low, as well as the size of the Board's staff has not substantially changed. The merely administrative functions associated with the increased workload have had a tremendous impact on the Board's resources. We have literally been buried with paper and are bursting at the seams. Despite the necessity for the Judges to absorb a significant amount of these additional administrative functions, the judges' productivity has remained relatively stable. I am convinced that when we acquire adequate additional personnel, the situation will improve. The fact that productivity has remained as high as it has reflects that the Board is blessed with quality people, who are dedicated to maintaining the Board's excellent reputation.

PAUL WILLIAMS
Chairman

Attachment

Data re Appeals Disposed of by the
Armed Services Board of Contract Appeals
During FY's 1981-1985

1. Origin of Appeals:	FY <u>1981</u>	FY <u>1982</u>	FY <u>1983</u>	FY <u>1984</u> *	FY <u>1985</u> **
Air Force	199	188	255	234	258
Army	322	341	425	524	463
DLA	154	139	157	218	232
Navy	206	198	212	267	251
Other (non-DOD)	34	72	82	63	61
2. Average amount of Claims (where Amount is stated):					
Prime Contractor	\$335,983	\$420,115	\$173,058	\$241,096	\$294,304
Gov't	\$114,920	\$380,718	\$286,606	\$238,968	\$102,762
Sub-Cont.	\$124,118	\$271,128	\$286,606	\$238,968	\$102,762
3. Business Size:					
Small Bus. Contr.	544	644	781	966	994
Small Bus. Set Aside	128	180	177	302	371
4. Real Party in Interest					
Prime Cont.	832	814	1,013	1,120	1,165
Sub-Contr.	82	103	91	110	49
Both	1	12	5	23	18
Other		9	22	53	33
5. Method of Award					
Adver.	453	551	720	781	735
Negotiated	419	353	329	396	366
Other	43	34	31	---	
Unknown			51	129	164

* 29 cases were cancelled as docketed in error or duplicates.

**28 cases were cancelled as docketed in error or duplicates.

	<u>FY</u> <u>1981</u>	<u>FY</u> <u>1982</u>	<u>FY</u> <u>1983</u>	<u>FY</u> <u>1984</u>	<u>FY</u> <u>1985</u>
6. Contract Type:					
Basic Agreem.	2	5	3	20	5
CPFF	29	19	42	24	21
CPIF	10	6	2	8	6
FFP	737	738	918	1,059	1,031
FPIF	24	13	7	5	11
Requirements	36	57	37	32	50
Other	77	100	122	158	141
7. Kind of Proc.					
Construc.	338	358	427	515	504
R&D	22	34	13	18	16
Service	135	212	236	246	247
Supply	380	299	401	437	427
Surplus Sale	21	20	24	16	5
Other	19	15	30	74	66
8. Principal Contr. Clause(s) or issue(s) involved in Dispute:*					
Actual Damages (Govt't claim)	1	4	-	8	6
Allow. Costs	29	53	55	33	65
Basic Agreem.			1	-	1
Bid Mistake	12	11	11	15	20
Bid Protest		9	8	3	-
Breach		8	6	6	35
Changes	266	236	285	243	244
Cost Acctg. Standards		6	4	2	-
Cost or Pric. Data	9	14	17	19	21
Cost Princ.	20	15	3	9	25
Default	235	210	250	253	245
Delivery	1	-	2	8	7
Differing Site Conditions	33	27	25	38	68
Discounts	-	1	-	1	11
All Disputes	-	-	-	-	8
Disputes (CDA)	-	18	13	93	150
Disputes (Juris.)	6	1	-	1	19
Economic Price Adj.			11	1	-

	<u>FY</u> <u>1981</u>	<u>FY</u> <u>1982</u>	<u>FY</u> <u>1983</u>	<u>FY</u> <u>1984</u>	<u>FY</u> <u>1985</u>
Equal Access to Justice			18	1	-
Est. Quant.		6	3	9	13
Excess Costs	21	28	21	16	35
Exc. Delay	2	1	1	7	36
First Article	1	-	4	10	19
Freight Chg.	3	1	-	1	-
G.F.P.	8	5	8	6	16
Gen. Average	1	-	-	-	2
Govt. Delay	12	12	18	17	-
Guar. Descr.	7	14	12	5	5
Inspection	11	19	20	19	53
Insurance	2	-	-	-	3
Int. Propert.		3	-	-	1
Interest	5	9	5	6	25
Labor	8	5	7	5	4
Liability for HHG Damages	6	7	2	14	15
Lim. of Costs			9	8	1
Liq. Damages	18	17	15	29	62
Miller Act	1	-	-	-	1
Mutual Mist.		1	1	4	7
Option to Ren.		2	2	2	8
Payments	25	22	36	24	36
Price Escal.	6	2	1	4	4
Prog. Paym.		6	6	13	29
Prop. Disposal	7	1	1	1	3
Requirements	4	6	3	4	31
Risk of Loss		5	6	4	9
Shipment	1	-	-	-	-
Specifications	81	97	152	160	100
Storage	-	-	-	-	1
Susp. of Work	3	2	4	10	51
Taxes	2	3	7	6	7
Termination for Convenience	14	17	18	21	31
Value Eng.	5	6	6	4	16
Warranty	12	13	10	49	36
Other	37	15	10	32	2
Unknown			34	82	83

*The statistics on this page are not longer truly representative of the subject matter of the Board's cases, especially under the Contracts Disputes Act. Changes in categories will be made as practical.

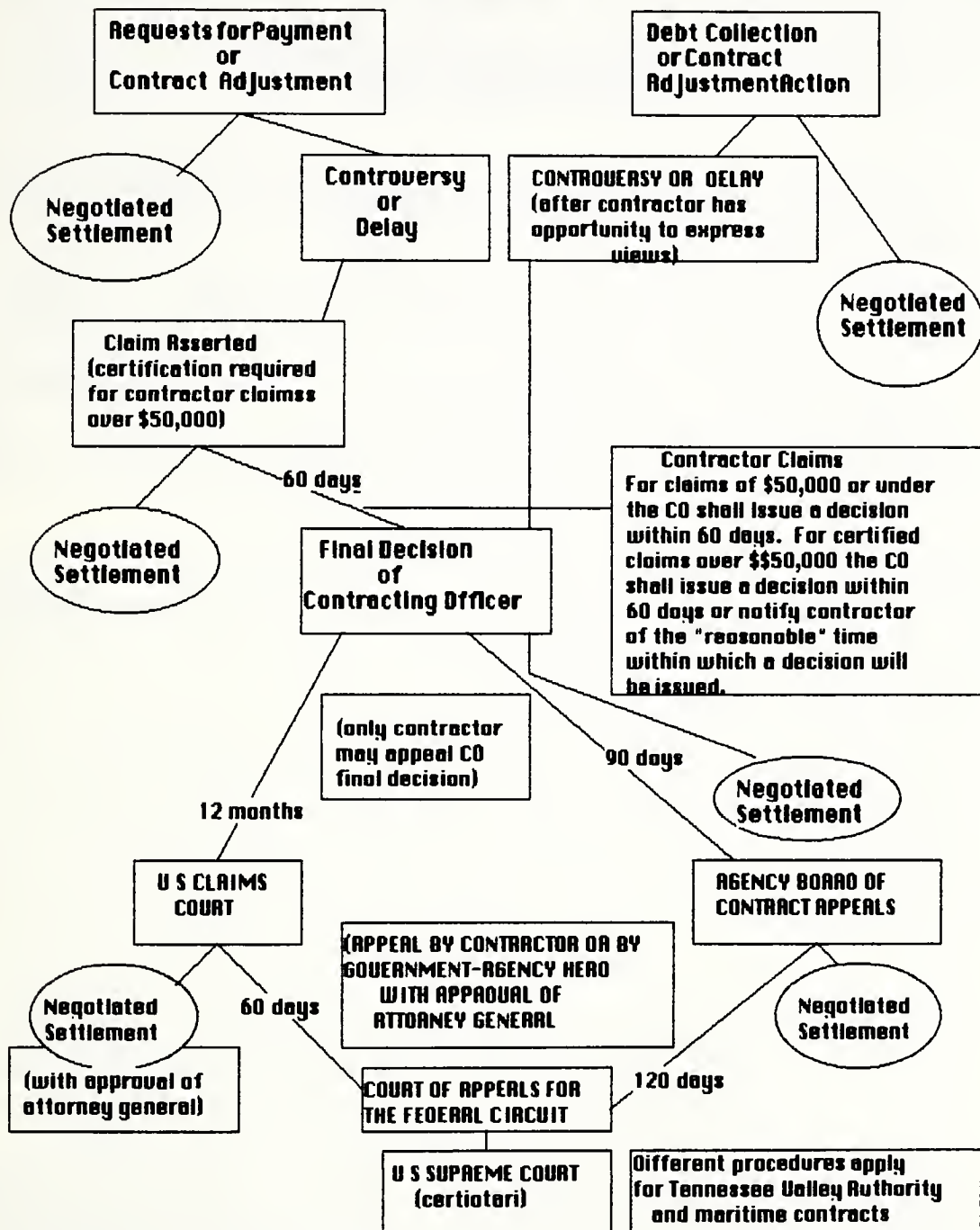
	<u>FY</u> <u>1981</u>	<u>FY</u> <u>1982</u>	<u>FY</u> <u>1983</u>	<u>FY</u> <u>1984</u>	<u>FY</u> <u>1985</u>
9. Hearings and Days of Hearing:*					
Hearings:					
In Wash. D.C.	38	36	56	46	58
Outside Wash. D.C.	147	136	151	169	181
Percentage outside Wash. D.C.	79%	79%	73%	79%	76%
Days of Hearing:					
In Wash. D.C.	61	94	142	100	175
Outside Wash. D.C.	304	286	278	349	393
Percentage outside Wash. D.C.	83%	75%	66%	78%	69%
10. Pre-Hearing Discovery (cases in which ruling sought):	58	77	148	137	300
11. Pre-Hearing Confer.	120	56	49	114	228
12. Rule 12 Proc.:					
# Proceed.	183	187	205	229	262
13. Record only Disposit.	58	79	73	75	168
14. Disposition:					
Settled	478	459	489	522	506
Dism. (no reason giv.)	17	14	23	28	15
Dism/Rule 30	28	78	123	124	118
Dism/Rule 31	90	88	107	184	41
Lack of Jurisd.	3	4	35	31	45
Dism/Withd.					121
Req. CO/Dec.	---	---	---	56	47

*Relates to hearings in appeals disposed of during a particular FY.

	<u>FY</u> <u>1981</u>	<u>FY</u> <u>1982</u>	<u>FY</u> <u>1983</u>	<u>FY</u> <u>1984</u>	<u>FY</u> <u>1985</u>
Denied	169	168	192	205	226
Sustained	130	127	162	158	146
(Remand)	77	81	116	99	87
(Not Stat.)		4	-	-	
(Amount De- termined)*	53	42	46	59	59
15. Time on Dock. (days from date of docket. to date of dec.):					
All cases:					
Average	458	438	422	450	484
Median	287	278	263	297	299
Rule 12 cases:					
Average	171	173	156	151	149
Median	151	148	137	149	130
16. Time from date appeal ready for dec. to date dec. filed (days):					
All cases					
Average	33	34	49	50	72
Median	1	1	1	4	7
Cases in which formal opn. filed:					
Average	65	78	114	105	193
Median	21	27	29	19	53
All Rule 12 appeals:					
Average	13	17	14	16	13
Median	5	7	3	8	7
*Total dollars determined during FY 81 was \$ 4,820,958.					
*Total dollars determined during FY 82 was \$35,142,367.					
*Total dollars determined during FY 83 was \$ 6,258,134.					
*Total dollars determined during FY 84 was \$19,104,775.					
*Total dollars determined during FY 85 was \$ 1,952,442.					

DISPUTES PROCESS

DISPUTES PROCESS



Source: Cibinic, J. Jr., and Nash, R.C., Jr.,
Administration of Government Contracts,
 George Washington University, p. 895.

APPENDIX C

DEFAULT (FIXED-PRICE SUPPLY
AND SERVICE) (APRIL 1984)

(a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to:

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).

(2) The Government's right to terminate this contract under subdivision (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

(b) If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services. However, the Contractor shall continue the work not terminated.

(c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

(e) If this contract is terminated for default, the Government may require the Contractor to transfer title and deliver to the Government, as directed by the Contracting Officer, any (1) completed supplies, and (2) partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (collectively referred to as "manufacturing materials" in this clause) that the Contractor has specifically produced or acquired for the terminated portion of this contract. Upon direction of the Contracting Officer, the Contractor shall also protect and preserve property in its possession in which the Government has an interest.

(f) The Government shall pay contract price for completed supplies delivered and accepted. The Contractor and Contracting Officer shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause. The Government may withhold from these amounts any sum the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

(h) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)

(R 1-8.707)

(R 7-103.11 1959 AUG)

Alternate I (APR 1984). If the contract is for transportation or transportation-related services, delete paragraph (f) of the basic clause, redesignate the remaining paragraphs accordingly, and substitute the following paragraphs (a) and (e) for paragraphs (a) and (e) of the basic clause:

(a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to:

(i) Pick up the commodities or to perform the services, including delivery services, within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).

(2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

(e) If this contract is terminated while the Contractor has possession of Government goods, the Contractor shall, upon direction of the Contracting Officer, protect and preserve the goods until surrendered to the Government or its agent. The Contractor and Contracting Officer shall agree on payment for the preservation and protection of goods. Failure to agree on an amount will be a dispute under the Disputes clause.

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